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QUESTION PRESENTED

Whether the weight assigned to a dosage unit of LSD by the Sentencing Commission to calculate a defendant's offense level under the Sentencing Guidelines also governs the determination of the weight of the "mixture or substance" containing LSD under the mandatory minimum sentencing provisions of 21 U.S.C. 841(b).

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In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 94-9088

MEIRL GILBERT NEAL, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (J.A. 35-63) is reported at 46 F.3d 1405. The order of the district court reducing petitioner's sentence (J.A. 31-34) is reported at 846 F. Supp. 1362.

JURISDICTION

The judgment of the court of appeals was entered on February 2, 1995. The petition for a writ of certiorari was filed on May 2, 1995, and was granted on June 19, 1995 (J.A. 64). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTE AND SENTENCING GUIDELINE INVOLVED

The pertinent text of 21 U.S.C. 841(b) is set forth in Appendix A to petitioner's brief (Pet. Br. App. 1-5). The pertinent parts of Sentencing Guidelines § 2D1.1(c) and of the Sentencing Commission's commentary thereto are set forth in Appendix D to petitioner's brief (Pet. Br. App. 29-31).

STATEMENT

Following a guilty plea in the United States District Court for the Central District of Illinois, petitioner was convicted on one count of possession of lysergic acid diethylamide (LSD) with intent to distribute it, in violation of 21 U.S.C. 841, and one count of conspiracy to possess LSD with intent to distribute it, in violation of 21 U.S.C. 846. He was originally sentenced to 192 months' imprisonment, to be followed by five years' supervised release. J.A. 11, 13-14. Following an amendment to the Sentencing Guidelines relating to LSD offenses, petitioner moved for a reduction in his sentence, pursuant to 18 U.S.C. 3582(c)(2). J.A. 18-23. The district court reduced petitioner's sentence to 120 months' imprisonment, the mandatory minimum term required by 21 U.S.C. 841(b)(1)(A)(v), but declined to reduce the sentence further. J.A. 31-34. The en banc court of appeals affirmed, with three judges dissenting. J.A. 35-63.

1. In the Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207, Congress established mandatory minimum sentences for offenses involving trafficking in controlled substances, including LSD. See 21 U.S.C. 841(b). A first offender who distributes one gram or more of a "mixture or substance containing a detectable amount of" LSD must be sentenced to at least five years' imprisonment and may be imprisoned for up to 40 years. 21 U.S.C. 841(b)(1)(B)(v). A first offender who distributes ten or more grams of a "mixture or substance" containing LSD must receive a sentence of at least ten years' imprisonment and may be confined for life. 21 U.S.C. 841(b)(1)(A)(v).[1] A first offender who distributes less than one gram of a "mixture or substance" containing LSD is not subject to a statutory mandatory minimum term, but he may be imprisoned, by statute, for up to 20 years (see 21 U.S.C. 841(b)(1)(C)), and he must be sentenced pursuant to the Sentencing Guidelines.

The mandatory minimum sentences in the Anti-Drug Abuse Act generally turn, not on the weight of the pure drug involved in the offense, but rather on the weight of a "mixture or substance" containing the illegal drug. In that respect, the Anti-Drug Abuse Act was a significant departure from previous law.[2]

---

[1] The minimum sentences are doubled if the defendant has a prior conviction for a felony drug offense. 21 U.S.C. 841(b)(1)(A) (flush paragraph) and (B) (flush paragraph). If death or serious bodily harm results from use of the LSD, a first offender who distributes one gram or more of a mixture or substance containing LSD must be sentenced to at least 20 years' imprisonment and fined severely, and a repeat offender who distributes one gram or more of an LSD mixture or substance must be confined for life. *Ibid.*

[2] The Controlled Substances Act, enacted in 1970, established penalties for the distribution of controlled substances according to the kind of drug involved, not its weight. The distribution of schedule I or II controlled substances carried a heavier punishment than the distribution of other drugs. See Pub. L. No. 91-513, Tit. II, § 401, 84 Stat. 1260-1262 (1970). The Controlled Substances Penalties Amendments Act of 1984, enacted as part of the Comprehensive Crime Control Act of 1984, introduced the principle that the sentence should vary

Congress's reliance on the weight of the "mixture or substance" reflects a "market-oriented" approach to punishing drug traffickers, under which sentences are based on the actual material distributed or intended to be distributed. See H.R. Rep. No. 845, 99th Cong., 2d Sess. Pt. 1, at 11-12, 17 (1986). Congress graduated the penalties according to the weight of the drugs in the form in which they are found—cut or uncut, pure or impure, ready for wholesaling or ready for distribution at the retail level.[3]

2. In 1987, after the enactment of the Anti-Drug Abuse Act, the United States Sentencing Commission (Commission) adopted Sentencing Guidelines to address trafficking in controlled substances. United States Sentencing Comm'n, *Sentencing Guidelines and Policy Statements* § 2D1.1 (Apr. 13, 1987) (April 1987 Guidelines). The April 1987 Guidelines followed the statutory mandatory minimum structure in several respects. The Commission established a Drug Quantity Table to designate base offense levels that

according to the weight of the drug chargeable to the defendant. In the case of LSD, the 1984 Act imposed a maximum term of 20 years' imprisonment for the distribution of five or more grams of LSD, and a maximum term of 15 years' imprisonment for the distribution of lesser amounts of LSD. See Pub. L. No. 98-473, Tit. II, Ch. V, 98 Stat. 2068. In each case, the relevant weight was that of pure LSD. *United States* v. *McGeehan*, 824 F.2d 677, 681 (8th Cir. 1987), cert. denied, 484 U.S. 1061 (1988).

[3] There are a few exceptions to that principle. For phencyclidine, propanamide, and methamphetamine, Congress tied mandatory minimum sentences to amounts of both the pure drug and a mixture or substance containing the drug. 21 U.S.C. 841(b)(1)(A)(iv), (vi) and (viii); 21 U.S.C. 841(b)(1)(B)(iv), (vi) and (viii). See *Chapman* v. *United States*, 500 U.S. 453, 459 (1991).

depended on the quantities of drugs involved in offenses. Those base offense levels generally yielded sentencing ranges corresponding to the ones required by the Anti-Drug Abuse Act; for example, an offense involving one gram of LSD was assigned a base offense level of 26, which yielded a sentencing range of 63 to 78 months' imprisonment, just above the statutory mandatory minimum term of five years.[4] The Guidelines also provided (and continue to provide) that, if application of the Guidelines results in a sentence below the minimum sentence required by statute, the statutory minimum shall be the Guideline sentence. See *id.* § 5G1.1(b). A footnote to the Drug Quantity Table in the April 1987 Guidelines stated that, "[c]onsistent with the provisions of the Anti-Drug Abuse Act, if any mixture of [*sic*] a compound contains any detectable amount of a controlled substance, the entire amount of the mixture or compound shall be considered in measuring the quantity." *Id.* § 2D1.1 (Drug Quantity Table) n.*.

The Commission revised its Guidelines and commentary on a number of occasions over the following years, but, until 1993, it retained the same general approach for drug trafficking offenses. Thus, in Application Note 10 to Guidelines § 2D1.1, added October 1, 1987, the Commission noted that it had "used the sentences provided in * * * the statute (21 U.S.C. § 841(b)(1)), as the primary basis for the guideline sentences." In the November 1, 1989, version of the Guidelines, the Commission provided that, "[u]nless otherwise specified, the weight of a

[4] April 1987 Guidelines § 2D1.1 (Drug Quantity Table); *id.* Ch. 5, Pt. A (Sentencing Table); see also *id.* § 2D1.1 (Commentary).

controlled substance set forth in the [drug quantity] table refers to the entire weight of any mixture or substance containing a detectable amount of the controlled substance." United States Sentencing Comm'n, *Guidelines Manual* § 2D1.1(c) n.* (Nov. 1, 1989) (1989 Guidelines). Application Note 1 to Guidelines § 2D1.1, added November 1, 1989, reiterated that "'[m]ixture or substance' as used in this guideline has the same meaning as in 21 U.S.C. § 841." See 1989 Guidelines App. C, Amend. 123.

3. In several prosecutions following the enactment of the statutory mandatory sentencing provisions, federal courts considered the proper treatment of LSD distributed on a carrier medium for purposes of those provisions. Because LSD is a very powerful drug, it typically is not sold or ingested in its pure form, but is distributed on a carrier medium, such as blotter paper, infused with minute quantities of the drug. The person using the LSD for its hallucinogenic effect can swallow the entire piece of blotter paper, lick the LSD from the paper, or drop the paper into a liquid. See *Chapman* v. *United States*, 500 U.S. 453, 457 (1991). As a rule, the weight of the carrier medium greatly exceeds the weight of the pure LSD that it contains.[5] Defendants charged with LSD offenses argued that only the weight of the pure LSD, and not the weight of the carrier medium, should be included when courts calculated the weight

[5] For example, the Drug Enforcement Administration estimates that the weight of the pure LSD contained in an average dose is 0.05 milligram (see Guidelines § 2D1.1, Commentary (Background) (Nov. 1, 1994)), while the weight of the average dose of LSD on blotter paper (by far the most popular carrier) is 8 milligrams. United States Sentencing Comm'n, *Guidelines Manual* App. C, Amend. 488 (Nov. 1, 1994).

of the "mixture or substance containing a detectable amount of" LSD under Section 841(b).

In *Chapman* v. *United States*, *supra*, this Court rejected that contention and ruled that courts must use the entire weight of the carrier medium and the LSD to determine whether a mandatory minimum sentence is applicable. Construing the statutory terms "mixture" and "substance" in light of their "ordinary meaning," 500 U.S. at 462, the Court concluded that the penalty turns on "the gross weight of the carrier and drug together," rather than the "net weight of the [pure] drug," *id.* at 459, and therefore held that LSD-infused blotter paper is a "mixture or substance containing a detectable amount" of LSD, *id.* at 461-463. The Court noted that, when LSD is applied to blotter paper, "[t]he LSD is diffused among the fibers of the paper * * * [and] cannot be distinguished from the blotter paper, nor easily separated from it." *Id.* at 462. Accordingly, the Court stated, "the weight of a carrier should be included as a 'mixture or substance containing a detectable amount' of LSD when determining the sentence for an LSD distributor." *Id.* at 463; see also *id.* at 455 ("We hold that it is the weight of the blotter paper containing LSD, and not the weight of the pure LSD, which determines eligibility for the minimum sentence.").

4. After *Chapman*, the Commission reconsidered its own approach to the treatment of LSD under the Guidelines. The Commission originally proposed that Guidelines sentences for LSD offenses be based on the weight of the pure LSD involved in the offense, rather than the "mixture or substance" containing LSD. See 57 Fed. Reg. 62,832, 62,853 (1992). The Commission subsequently embraced an entirely new

approach, however, when it promulgated Amendment 488 to the Guidelines, which revised Guidelines § 2D1.1(c) with respect to LSD offenses.[6]

Although the amended Guideline nominally continues to use drug weights to calculate the defendant's base offense level, the Commission abandoned its prior reliance on the *actual* weight of the entire "mixture or substance" to calculate the base offense level. Instead, the Commission adopted a system of sentencing based on the number of doses of LSD involved in offenses. To implement that new approach, the Commission assigned to each dose of LSD a *constructive* weight of 0.4 milligram. The revised Guideline provides:

> In the case of LSD on a carrier medium (*e.g.*, a sheet of blotter paper), do not use the weight of the LSD/carrier medium. Instead, treat each dose of LSD on the carrier medium as equal to 0.4 mg of LSD for the purposes of the Drug Quantity Table.

United States Sentencing Comm'n, *Guidelines Manual* § 2D1.1(c) n.* (Nov. 1, 1994).[7]

As amended, the LSD Guideline results in lower drug weights, which translate into lower Guidelines

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[6] The Sentencing Reform Act of 1984 requires that the Commission submit amendments to the Guidelines to Congress for review for at least 180 days. The amendments take effect if they are not disapproved or modified by Congress during that period. See 28 U.S.C. 994(p). The Commission transmitted Amendment 488 to Congress on April 29, 1993 (see 58 Fed. Reg. 27,148, 27,155-27,156 (1993)), and it took effect on November 1, 1993.

[7] Amendment 488 took effect on November 1, 1993. Unless otherwise specified, all further references to the Guidelines in this brief are to the November 1, 1994, edition, which incorporates other amendments not relevant to this case.

sentencing ranges. For example, the actual weight of the average dose of LSD on blotter paper, including the carrier, is 8 milligrams (see note 5, *supra*), which is 20 times the constructive weight of 0.4 milligram per dose chosen by the Commission. Thus, a first-time offender who distributed 1,000 "average" doses of LSD would, under *Chapman* and the former Guidelines, receive a sentence based on 8 grams of a "mixture or substance" containing LSD; that offender would be subject to a five-year mandatory term of imprisonment under 21 U.S.C. 841(b)(1)(B)(v) and a Guidelines sentencing range of 97 to 121 months' imprisonment (reflecting a base offense level of 30). Under the revised LSD Guideline, that offender would be chargeable with only 400 milligrams of LSD, which would yield a base offense level of 20 and a Guidelines sentencing range of 33 to 41 months' imprisonment.

The Commission also amended the background to the commentary on Section 2D1.1 to explain its view that, "[b]ecause the weights of LSD carrier media vary widely and typically far exceed the weight of the controlled substance itself, the Commission has determined that basing offense levels on the entire weight of the LSD and carrier medium would produce unwarranted disparity among offenses involving the same quantity of LSD (but different carrier weights)." Guidelines § 2D1.1, Commentary (Background). "Consequently," the Commission stated, "in cases involving LSD contained in a carrier medium, [we have] established a weight per dose of 0.4 milligram for purposes of determining the base offense level." *Ibid.* The Commission remarked that the figure of 0.4 milligram per dose does not represent the actual weight of either the pure LSD or the LSD

with the carrier, but was chosen as a constructive figure to represent the drug and some amount of the carrier:

> The dosage weight of LSD selected exceeds the Drug Enforcement Administration's standard dosage unit of LSD of 0.05 milligram (*i.e.*, the quantity of actual LSD per dose) in order to assign some weight to the carrier medium. Because LSD typically is marketed and consumed orally on a carrier medium, the inclusion of some weight attributable to the carrier medium recognizes (A) that offense levels for most other controlled substances are based upon the weight of the mixture containing the controlled substance without regard to purity, and (B) the decision in *Chapman v. United States*, [500 U.S. 453] (1991) (holding that the term "mixture or substance" in 21 U.S.C. § 841(b)(1) includes the carrier medium in which LSD is absorbed).

Guidelines § 2D1.1, Commentary (Background).

The Commission also stated that its new approach "will * * * avoid an undue influence of varied carrier weight on the applicable offense level." Guidelines § 2D1.1, Commentary (Background). "Nonetheless," the Commission observed, "this approach does not override the applicability of 'mixture or substance' for the purpose of applying any mandatory minimum sentence." *Ibid.* (citing *Chapman* and Guidelines § 5G1.1(b)).

5. In a series of transactions that took place in February and March 1988, petitioner sold LSD on blotter paper to an undercover agent of the Illinois State Police and a confidential source working with the police. Original Presentence Report (PSR) 8-13

(May 9, 1989). The narcotics sold contained 11,456 dosage units of LSD. Updated PSR 3 (Mar. 4, 1994). The total weight of the LSD sold by petitioner, including the blotter paper, was 109.51 grams. Original PSR 13.

Because the total weight of the LSD, including the blotter paper, exceeded ten grams, petitioner was subject to the ten-year mandatory minimum sentence specified in 21 U.S.C. 841(b)(1)(A)(v). Under the version of the Sentencing Guidelines in effect on the date of his sentencing (June 19, 1989), an offense involving more than 100 grams of LSD yielded a base offense level of 36. Petitioner received a reduction in his offense level of two points, to 34, for acceptance of responsibility. Original PSR 14-15. Because petitioner had prior convictions, he was in criminal history category III, and his Guidelines sentencing range was 188 to 235 months' imprisonment. *Id.* at 17-18. The district court sentenced petitioner to 192 months' imprisonment. J.A. 13.

6. On December 10, 1993, petitioner filed a motion to modify his sentence, relying on the retroactive application of the new version of the LSD Guideline.[8] He contended that the weight of the LSD, as calculated by the new version of Guidelines § 2D1.1, was only 4.28 grams,[9] and therefore he was no longer subject to the ten-year mandatory minimum sentence for offenses involving ten grams or more of LSD. J.A.

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[8] The Commission authorized retroactive application of Amendment 488. See United States Sentencing Comm'n, *Guidelines Manual* App. C, Amend. 502.

[9] As petitioner notes (Pet. Br. 4 n.4), the weight of the LSD involved in his offense, as calculated under the revised LSD Guideline, is in fact 4.58 grams. The difference does not affect the sentence calculation.

18-23. An updated version of his PSR concluded that, under the new Guidelines, his offense level was 25, which yielded a Guidelines sentencing range of 70 to 87 months' imprisonment. Updated PSR 4-5.

The district court concluded that petitioner was still subject to the ten-year mandatory minimum sentence. J.A. 31-34. The court noted that the background commentary to the amendment to Guidelines § 2D1.1 stated that the Commission did not intend to overrule this Court's decision in *Chapman* for the purpose of applying "any mandatory minimum sentence." See J.A. 33. The court thus concluded that "the mandatory minimum sentence of 120 months mandated by 21 U.S.C. § 841(b)(1)(A)(v) supersedes [petitioner's] revised guideline range of 70 to 87 months." *Ibid.* The court did, however, reduce petitioner's term of imprisonment to 120 months, since the Guidelines no longer require a sentence in excess of the mandatory minimum level. J.A. 34.

7. The court of appeals, sitting en banc, affirmed petitioner's revised sentence. J.A. 35-63. The court acknowledged that, "[u]nder the district court's interpretation of federal law, a single amount of LSD is assigned two different weights for sentencing purposes: one weight for determining the base offense level under the Guidelines and another weight for determining eligibility for the mandatory minimum sentences provided in 21 U.S.C. § 841(b)(1)(A)(v)." J.A. 41. The court nonetheless concluded that the district court's interpretation was correct, for the post-amendment commentary to Guidelines § 2D1.1 "clearly indicates that the Commission promulgated Amendment 488 in full recognition that it would create a 'dual weight' system of calculating the weight of LSD for sentencing purposes and that

where the Guidelines approach conflicted with the statutory mandatory minimum scheme, the latter would prevail." J.A. 43. Therefore, the court concluded, "[e]ven if an amendment to the Sentencing Guidelines could super[s]ede the Supreme Court's interpretation of a separate statute, [the Guidelines commentary] make[s] clear that the amendment to § 2D1.1 purported to do no such thing." J.A. 43-44. The court also remarked that *Chapman*'s authoritative construction of the term "mixture or substance" must continue to govern the application of the mandatory minimum statute because "[t]he Commission is without authority to override *Chapman*[,] * * * '[as the Sentencing Commission has] only the power to guide judicial discretion within the statutory limits.'" J.A. 44-45.

The court rejected petitioner's argument that using the Commission's new dosage weight formula to calculate the base offense level while continuing to rely on the actual weight of the drug and carrier to determine eligibility for the mandatory minimum sentence created an arbitrary distinction in violation of due process. The court concluded that the dual-weight scheme has a rational basis: "[T]hose who deal more LSD will be punished more heavily than those who deal less, and at a certain point there is a qualitative leap in the seriousness of the deed that will give rise to a sudden rather than an incremental increase." J.A. 47. The court further concluded that the rule of lenity was not applicable to this case because there is no ambiguity in the sentencing structure set up by Congress and the Sentencing Commission. J.A. 47-48.

Circuit Judge Ripple, joined by Judges Cummings and Rovner, dissented. J.A. 50-63. The dissent argued

that the amended LSD Guideline is consistent with this Court's construction of Section 841(b) in *Chapman* because it simply assigns a fixed, uniform weight to carrier media. J.A. 53. The dissent also stressed that Congress had allowed the amended Guideline to take effect without modification or delay, and "hence with congressional approval." J.A. 61. Because, in the dissent's view, "Amendment 488 remains true to the *Chapman* mandate that the weight of the carrier must be included," J.A. 62, the dissent would have held that the weight assigned to LSD by the amended version of Guidelines § 2D1.1 also governs the weight of a "mixture or substance" containing LSD for the purpose of applying the mandatory minimum statute.

SUMMARY OF ARGUMENT

I. The Sentencing Commission's revised LSD Guideline has no application to sentencing under the mandatory minimum penalty statute, 21 U.S.C. 841(b). When the Commission promulgated Amendment 488 and adopted a constructive dosage weight approach to Guidelines sentencing for LSD offenses, it did not intend that the revised Guideline be used for sentencing under Section 841(b). The Commission stated that the new constructive weight of 0.4 milligram per dose of LSD was to be used in applying the Guidelines' Drug Quantity Table, which has relevance only to Guidelines sentencing, and gave no indication that the 0.4-milligram figure should have any application outside that context. In its commentary accompanying the revised Guideline, the Commission acknowledged the controlling force of *Chapman* v. *United States*, 500 U.S. 453 (1991), which requires that, under Section 841(b), the weight of the entire mixture or

substance be used. It also confirmed that, under Guidelines § 5G1.1(b), a statutory mandatory minimum sentence trumps any Guidelines sentencing range.

II. In any event, the Commission has no authority to overrule the decision in *Chapman*. Congress has not delegated to the Commission the authority to construe terms in Section 841(b) or to alter the sentencing policy established in that statute, which requires minimum sentences to be based on the weight of the entire mixture or substance containing LSD. Even if the Commission intended the new LSD Guideline to be an interpretation of Section 841(b), that interpretation would not be entitled to any deference.

Furthermore, even if the Commission's views were generally relevant in construing Section 841(b), the new LSD Guideline still could not be given effect. First, it conflicts with this Court's definitive construction of Section 841(b) in *Chapman*. *Chapman* requires that the weight of the entire mixture or substance be taken into account; the new LSD Guideline expressly and purposely abrogates that requirement. Second, even without the construction in *Chapman*, the new Guideline could not be squared with the language of Section 841(b), for there is no room in the statute for sentences based on something other than the actual weight of the mixture or substance distributed by the defendant, such as the constructive weight adopted by the Commission.

III. Congress's failure to modify or disapprove Amendment 488 during the six months between its submission by the Commission and its effective date has no legal significance, other than to allow the Amendment to take effect for Guidelines sentencing.

Congress can alter Section 841(b), as construed in *Chapman*, only through the constitutionally specified processes of bicameralism and presentment. Its inaction on a proposed Guideline does not have the effect of a statutory amendment. Furthermore, because the Commission confined the operation of Amendment 488 to Guidelines sentencing, there was no reason for Congress to believe that it would have any effect on sentencing under Section 841(b).

ARGUMENT

THE CONSTRUCTIVE DOSAGE WEIGHT IN THE REVISED LSD SENTENCING GUIDELINE DOES NOT GOVERN THE WEIGHT OF A "MIXTURE OR SUBSTANCE" CONTAINING LSD UNDER THE MANDATORY MINIMUM SENTENCING STATUTE

In *Chapman* v. *United States*, 500 U.S. 453, 459 (1991), this Court held that, when sentencing courts calculate the weight of a "mixture or substance containing a detectable amount" of LSD under the mandatory minimum sentencing statute, 21 U.S.C. 841(b), they must use the actual, entire weight of the drug and its carrier medium. A recent amendment to the Sentencing Guidelines instructs courts to apply a constructive weight of 0.4 milligram per dose of LSD distributed on a carrier medium when calculating a defendant's base offense level under the Guidelines. The question presented in this case is whether the Sentencing Commission's new approach should also be employed to determine the applicability of a statutory mandatory minimum sentence. The court of appeals correctly concluded that the amendment of the LSD Guideline has no effect on the statutory

method of determining the weight of a "mixture or substance" containing LSD.[10]

I. THE SENTENCING COMMISSION DID NOT INTEND THAT ITS REVISED LSD GUIDELINE BE APPLIED TO THE "MIXTURE OR SUBSTANCE" CALCULATION UNDER SECTION 841(b)

Petitioner argues that the new LSD Guideline must be applied to sentencing under Section 841(b) because the Commission intended that result, because the courts owe deference to the Commission's action, and because Congress sanctioned application of the new Guideline to mandatory minimum sentencing. His argument fails at the threshold. In both the revised Guideline itself and the Background Commentary explaining that Guideline (which is entitled to deference under *Stinson* v. *United States*, 113 S. Ct. 1913 (1993)), the Commission made clear that it did

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[10] The court of appeals' conclusion is consistent with published decisions in seven other circuits. *United States* v. *Boot*, 25 F.3d 52, 55 (1st Cir. 1994); *United States* v. *Kinder*, 64 F.3d 757 (2d Cir. 1995); *United States* v. *Hanlin*, 48 F.3d 121 (3d Cir. 1995); *United States* v. *Pardue*, 36 F.3d 429, 431 (5th Cir. 1994), cert. denied, 115 S. Ct. 1969 (1995); *United States* v. *Andress*, 47 F.3d 839 (6th Cir. 1995); *United States* v. *Stoneking*, 60 F.3d 399 (8th Cir. 1995) (en banc), petition for cert. pending, No. 95-5410; *United States* v. *Mueller*, 27 F.3d 494, 496-497 (10th Cir. 1994). Two other courts of appeals have reached the same result in unpublished decisions. See *United States* v. *Thomas*, 36 F.3d 1095 (4th Cir. 1994) (Table) (No. 94-6053), petition for cert. pending, No. 94-8233; *United States* v. *Bollwage*, 47 F.3d 431 (11th Cir. 1995) (Table) (No. 94-2120), petition for cert. pending, No. 94-8475. Only the Ninth Circuit has agreed with petitioner's argument that the revised LSD Guideline now governs the statutory minimum sentencing statute. *United States* v. *Muschik*, 49 F.3d 512 (1995), petition for cert. pending, No. 95-156.

not intend that courts apply its revised Guideline to determine the applicability of a mandatory minimum sentence under Section 841(b).

The Commission has always recognized that its discretion in setting sentencing ranges is limited by maximum and minimum sentences prescribed by statutes. Guidelines § 5G1.1(a) provides that, "[w]here the statutorily authorized maximum sentence is less than the minimum of the applicable guideline range, the statutorily authorized maximum sentence shall be the guideline sentence." Conversely, Guidelines § 5G1.1(b) states that, "[w]here a statutorily required minimum sentence is greater than the maximum of the applicable guideline range, the statutorily required minimum sentence shall be the guideline sentence." Those two Guidelines make clear that the Commission claims no authority to override any statutory sentencing directive.

In general, the Commission has coordinated the Guidelines sentencing ranges for drug offenses with the mandatory minimum sentences of the Anti-Drug Abuse Act. In the current Guidelines, as in previous versions, the Drug Quantity Table in Guidelines § 2D1.1(c) sets the base offense levels for most drug offenses at levels that correspond to the applicable statutory minimum sentences. See Guidelines § 2D1.1, Commentary (Background).[11] In addition, the

[11] For example, the Drug Quantity Table assigns a base offense level of at least 32 to offenses involving amounts of drugs that trigger a ten-year minimum sentence under 21 U.S.C. 841(b)(1)(A). That offense level yields a Guidelines sentencing range (for a first offender) of 121-151 months' imprisonment, which has "a lower limit as close to the statutory minimum as possible." Guidelines § 2D1.1, Commentary (Background).

Commission has provided that, "[u]nless otherwise specified, the weight of a controlled substance set forth in the [Drug Quantity Table] refers to the entire weight of any mixture or substance containing a detectable amount of the controlled substance." Guidelines § 2D1.1(c) n.*. The Commission has explained that the term "mixture or substance" for Guidelines purposes should have "the same meaning as in 21 U.S.C. § 841, except as expressly provided." Guidelines § 2D1.1, Application Note 1. Under the Commission's approach, therefore, drugs involved in an offense will usually have the same weight for Guidelines sentencing as they have for sentencing under Section 841(b).

After *Chapman* was decided, the Commission decided to take a different approach to LSD sentencing under the Guidelines than it has taken for other drug trafficking offenses. Guidelines § 2D1.1(c) n.* directs the courts to use "the entire weight of any mixture or substance" containing a controlled substance, "[u]nless otherwise specified." In Amendment 488, which revised the asterisk note to Guidelines § 2D1.1(c) as of November 1, 1993, the Commission did "otherwise specif[y]," by instructing courts not to "use the weight of the LSD/carrier medium" but rather to "treat each dose of LSD on the carrier medium as equal to 0.4 mg of LSD for the purposes of the Drug Quantity Table." Guidelines § 2D1.1(c) n.*.

Read together, the new Guideline and accompanying commentary demonstrate that the Commission intended its new dosage weight approach to be applied only to sentencing under the Guidelines. The asterisk note to Guidelines § 2D1.1(c) (which is part of the Guideline itself) instructs sentencing courts to treat each dose of LSD on a carrier medium as equal to 0.4

milligram "for the purposes of the Drug Quantity Table." Application of the Drug Quantity Table, which is arranged by weights of various drugs, determines the defendant's base offense level; that offense level, after adjustments and when considered with the defendant's criminal history, yields the defendant's Guidelines sentencing range. The Drug Quantity Table has no operation or significance outside the Guidelines, and the Commission gave no indication that the new LSD footnote to the Table should be treated as an extraordinary exception to that fact. To the contrary, the commentary to revised Guidelines § 2D1.1 reiterates that "the Commission has established a weight per dose [of LSD] of 0.4 milligram for purposes of determining *the base offense level*." Guidelines § 2D1.1, Commentary (Background) (emphasis added).[12]

The Commission also directly addressed the effect of the revised LSD Guideline on mandatory minimum sentences in its commentary to the new Guideline.

[12] The weight of 0.4 milligram assigned by the Commission to each dose of LSD is a small fraction of the actual weight of the average dose of LSD with its carrier medium. Thus, if the dosage weight approach were applied to sentencing under Section 841(b), it would dramatically raise the threshold for application of the mandatory minimum statute. Under *Chapman*, a defendant who sells 1,250 doses on blotter paper of average weight (8 milligrams) is subject to a ten-year mandatory minimum sentence under Section 841(b)(1)(A)(v). If a weight of 0.4 milligram per dose were used, however, the ten-year mandatory minimum sentence would not apply unless the defendant sold 25,000 doses of LSD. Had the Commission intended to limit the operation of Section 841(b) so dramatically, it undoubtedly would have acknowledged the intended effect of its amendment and discussed whether its actions were consistent with the statute and *Chapman*.

After expressing its view that the revision was needed to avoid sentence disparities caused by "varied carrier weight," the Commission cautioned, "[n]onetheless, this approach does not override the applicability of 'mixture or substance' for the purpose of applying any mandatory minimum sentence (*see Chapman*; §5G1.1(b))." Guidelines § 2D1.1, Commentary (Background).[13] The meaning of that commentary is evident: The Commission recognized that courts must continue to apply *Chapman*'s directive to use the actual weight of the entire "mixture or substance" when determining the applicability of mandatory minimum sentences for LSD offenses, even while using the constructive dosage weight to calculate base offense levels that dictate Guidelines sentencing ranges.

The Commission's statement in the commentary about the intended reach of the revised Guideline is binding on the courts. Under *Stinson* v. *United States*, 113 S. Ct. at 1920, the Commission's commentary construing a particular Guideline is controlling as long as it does not "run afoul of the Constitution or

[13] The explanatory commentary accompanying Amendment 488 reiterates that point in language that even more clearly demonstrates that the Commission did not intend to disturb the construction of Section 841(b) adopted in *Chapman*. The Commission there stated, "[n]onetheless, this approach does not override the *definition* of mixture or substance for purposes of applying any mandatory minimum sentence (*see Chapman*; §5G1.1(b))." United States Sentencing Comm'n, *Guidelines Manual* App. C, Amend. 488 (emphasis added). The Commission's use of the term "definition" in place of "applicability," which is the term used in the Commentary to the Guideline, suggests that the Commission understood the construction of the statute to be fixed by this Court and not subject to revision by the Commission.

a federal statute, and is not 'plainly erroneous or inconsistent' with [the Guideline]." Petitioner does not suggest that limiting the Commission's dosage weight approach to Guidelines sentencing presents any constitutional difficulties; indeed, that limitation avoids constitutional problems involving bicameralism and presentment raised by petitioner's argument that Congress ratified the revised Guideline by failing to prevent it from taking effect. See pp. 37-38, *infra*. And the commentary does not conflict with Section 841(b), since it acknowledges the superior force of that statute over the Guideline. It is consistent also with Guidelines § 2D1.1(c) n.*, for both texts acknowledge that Amendment 488 is restricted to application of the Drug Quantity Table.

2. Petitioner contends that, in acknowledging that the dosage weight approach does not "override" the *Chapman* construction of "mixture or substance," the Commission meant only to suggest that its revision was consistent with *Chapman*. Pet. Br. 31-34. He argues that the revised Guideline reflects the Commission's recognition that the weight of the carrier medium must somehow be taken into account to give meaning to the terms "mixture or substance" for LSD offenses, and that the commentary merely confirms that recognition. That argument is incorrect.[14]

The revised LSD Guideline does retain some aspects of the "mixture or substance" requirement

[14] A panel of the Ninth Circuit and several dissenting judges in other circuits have advanced essentially the same argument. See *Muschik*, 49 F.3d at 516; J.A. 55-59, 63 (dissent to decision below); *Kinder*, 64 F.3d at 768-769 (Leval, J., dissenting); *Stoneking*, 60 F.3d at 408-409 (Beam, J., dissenting).

found in the counterpart mandatory minimum provisions of Section 841(b). Thus, the Commission did not move to a sentencing scheme based on the weight of the pure drug; rather, it adopted a constructive weight of 0.4 milligram to represent the combined weight of the drug and its carrier. That does not mean, however, that the Commission intended that its revision have any application beyond sentencing under the Guidelines. Most telling in that regard is the Commission's citation to Guidelines § 5G1.1(b) at the very end of the new background commentary. Guidelines § 5G1.1(b) confirms that, in the event of a conflict between a mandatory minimum sentencing statute and a Guidelines sentencing range (as where the entire Guidelines range is below the statutory minimum sentence), the statute prevails. See p. 18, *supra*. By citing Guidelines § 5G1.1(b) and emphasizing that, "[n]onetheless, [the revised] approach does not override" the statutory "mixture or substance" requirement, the Commission demonstrated its understanding that the requirements of the statute, as construed in *Chapman*, would prevail over any inconsistent sentencing range calculated under the Guidelines.

Petitioner suggests, however (Pet. Br. 33), that the Commission's acknowledgment of the "mixture or substance" element in Amendment 488 is best explained by reference to the simultaneously promulgated Amendment 484, in which the Commission excluded from its own definition of "mixture or substance" materials "that must be separated from the controlled substance before the controlled substance can be used." See Guidelines § 2D1.1, Application Note 1. The commentary accompanying Amendment 488, however, gave no indication that the

revision of the LSD Guideline had any relation to the separate subject with which Amendment 484 was concerned. Amendment 484 resolved an issue, for Guidelines sentencing purposes, that was arguably not treated in *Chapman*.[15] Amendment 488, however, dealt specifically with the issue presented in *Chapman* under counterpart Guidelines provisions, limited that Amendment's reach to Guidelines sentencing, and acknowledged that the *Chapman* rule remained controlling in the event of a conflict between the Guidelines and the statute.

II. THE REVISED LSD GUIDELINE CANNOT BE APPLIED AS A CONSTRUCTION OF THE MANDATORY MINIMUM SENTENCING STATUTE

A. The Sentencing Commission Does Not Have Authority To Define The Reach Of "Mixture Or Substance" In Section 841(b)

Even if the Commission had intended its dosage weight approach to LSD offenses to govern sentencing under Section 841(b), the revised Guideline nonetheless could not be given effect in that context. With respect to certain drug offenses, Congress has not given the Commission its customary discretion in

[15] In *Chapman*, the Court noted that "[i]t may be true that the weights of containers and packaging materials generally are not included in determining a sentence for drug distribution." 500 U.S. at 463. Amendment 484 addresses much more specifically the treatment of substances associated with the production or distribution of drugs, such as "the fiberglass in a cocaine/fiberglass bonded suitcase, beeswax in a cocaine/beeswax statue, and waste water from an illicit laboratory used to manufacture a controlled substance." United States Sentencing Comm'n, *Guidelines Manual* App. C, Amend. 484; Guidelines § 2D1.1, Application Note 1.

setting sentencing ranges. Nor has Congress delegated to the Commission the task of construing the "mixture or substance" element in the sentencing statute. Instead, Congress has set the minimum sentence itself and has placed in the statute the condition for application of that minimum sentence: the actual weight of drugs and carrier medium involved in the offense. Congress has left no room for the Commission to modify or interpret that requirement.[16]

1. As the Court noted in *Mistretta* v. *United States*, 488 U.S. 361, 364 (1989), "Congress * * * has the power to fix the sentence for a federal crime, * * * and the scope of judicial discretion with respect to a sentence is subject to congressional control." For most federal crimes, Congress has set only a maximum penalty and has delegated to the Sentencing Commission the task of establishing the permissible range of sentences below that maximum. See generally *id.* at 364-365, 369. But for some offenses, including those subject to the Anti-Drug Abuse Act, Congress has further established federal sentencing policy by imposing mandatory minimum penalties. The Commission cannot direct courts to impose a sentence outside those statutory limits, for, as the court of appeals correctly observed, the Commission's authority includes "only the power to

[16] With respect to offenses involving less than one gram of a mixture or substance containing LSD, Congress has left the Commission its customary discretion, and the new Guideline can be applied to such offenses. See 21 U.S.C. 841(b)(1)(C); p. 3, *supra*. The new Guideline can also be applied if the sentencing court, on motion by the government, departs downward from the mandatory minimum sentence because of the defendant's substantial assistance to the prosecution. See 18 U.S.C. 3553(e).

guide judicial discretion within the statutory limits." J.A. 45; see 28 U.S.C. 994(r) (Commission may recommend to Congress that it raise or lower statutory maximum penalties). "The Sentencing Commission promulgates guidelines by virtue of an express congressional delegation of authority for rulemaking," *Stinson* v. *United States*, 113 S. Ct. at 1919, and its authority reaches only as far as Congress has extended it.

Mandatory minimum penalties specified by Congress may well diverge from the Guidelines sentencing ranges that would apply in their absence. The Commission has, in fact, criticized mandatory minimum sentencing statutes (including the Anti-Drug Abuse Act of 1986) for creating a "cliff" effect in sentencing, such that small incremental increases in the quantities of drugs involved in offenses lead to large increases in the severity of sentences. See United States Sentencing Comm'n, *Special Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* 30-31 (Aug. 1991) [hereinafter *Mandatory Minimum Penalties*]. But whatever the policy arguments against mandatory minimum statutes, those arguments have no relevance to the issue at hand, for it cannot be disputed that such statutes must be given controlling effect in cases in which they apply. In cases like this one, moreover, the existence of any "cliff" effect results less from any mandatory minimum statute than from the Commission's decision dramatically to lower sentences for LSD offenses. When the Commission's views about sentencing policy depart from those of Congress, it may become difficult to achieve entirely consistent sentencing, but that is a matter for Congress, not the courts, to address. Cf. *Maislin*

Industries, U.S., Inc. v. *Primary Steel, Inc.*, 497 U.S. 116, 138 (1990) (Scalia, J., concurring).

Petitioner is therefore wide of the mark when he argues (Pet. Br. 9, 25) that the Court should not interpret Section 841(b) as an "implied repeal" of the Commission's general authority to set sentencing policy. Section 841(b) is an express exception to the system of Guidelines sentencing and has long been recognized as such. See *Mandatory Minimum Penalties* 26 ("In numerous * * * respects * * * mandatory minimums are both structurally and functionally at odds with sentencing guidelines and the goals the guidelines seek to achieve."); *id.* at 28 (describing mandatory minimums in Section 841(b) as "illustrative" of sentencing approach substantially different from that pursued in the Guidelines).

2. Petitioner contends that the courts should give effect to the Commission's new LSD Guideline in sentencing under Section 841(b) because the Commission purportedly has authority to define terms in that statute. Pet. Br. 20-28. Nothing in the Anti-Drug Abuse Act, however, suggests that Congress vested the Commission with the authority to interpret or to define the statutory phrase "mixture or substance." And absent delegation of authority to an agency, sentencing statutes are construed and applied by the courts, using traditional tools of statutory construction. See, *e.g.*, *United States* v. *Granderson*, 114 S. Ct. 1259 (1994); *Deal* v. *United States*, 113 S. Ct. 1993 (1993); *Taylor* v. *United States*, 495 U.S. 575 (1990); see also *Crandon* v. *United States*, 494 U.S. 152, 177 (1990) (Scalia, J. concurring in the judgment) ("The law in question, a criminal statute, is not administered by any agency but by the courts."). This Court has previously described as "dubious" the argu-

ment that the Guidelines are even "relevant" to interpretation of parallel terms in criminal statutes, which, like mandatory minimum provisions, are addressed to the courts, not the Commission. *Smith* v. *United States*, 113 S. Ct. 2050, 2055 (1993); see also *United States* v. *Palacio*, 4 F.3d 150, 155 (2d Cir. 1993) ("[U]nless the Sentencing Commission is construing its own authority as an agency, its view of the substantive meaning of a criminal statute is unlikely to be entitled to any deference.") (citation omitted), cert. denied, 114 S. Ct. 1194 (1994).[17]

Petitioner notes (Pet. Br. 21-22) that the Commission necessarily makes interpretations of federal criminal statutes in the course of fashioning Guidelines, because the Commission must strive to define the conduct that each statute prohibits to set an appropriate sentencing range. But the only products of that effort that are entitled to deference are the Guidelines sentencing ranges themselves and the Commission's commentary that explains them; the Commission is not authorized to render interpretations of substantive federal criminal law. Similarly, the Commission may consider mandatory minimum statutes in developing the Guidelines, but Congress

[17] Petitioner suggests (Pet. Br. 24) that, in the legislative history of the Sentencing Reform Act of 1984, Congress contemplated a role for the Commission in administering mandatory minimum penalty laws. The discussion cited by petitioner, however, merely refers to such laws as part of existing sentencing practice and, at most, suggests that they would continue to exist even after Congress's comprehensive reform of sentencing. See S. Rep. No. 225, 98th Cong., 1st Sess. 66 (1983). The Senate Report did not suggest that the Commission was being delegated authority to construe terms in mandatory minimum statutes.

left it to the courts to interpret and enforce the mandatory minimum provisions of federal sentencing law.[18]

Petitioner suggests that *Chapman* construed a "technical term" in the penalty statute, and that the Commission may therefore have a role in redefining that term. Pet. Br. 23, 28. He also suggests that deference to the Commission's "interpretation" of that supposedly technical term is appropriate because the 0.4 milligram dosage weight is the product of the Commission's "technical expertise" regarding the portion of the carrier medium that can be said to have "mixed" with the LSD. Pet. Br. 42, 44. The *Chapman* decision, however, did not describe the phrase "mixture or substance" as technical. Rather, the Court observed that, because the words are not defined by the statute and do not have any established common law meaning, they "must be given their ordinary meaning." 500 U.S. at 462. Nor did the Commission purport to base Amendment 488 on a scientific conclusion about the actual dispersion of

[18] The primary situation in which the Commission might have occasion to "construe" mandatory minimum penalty statutes would be to coordinate Guidelines sentencing ranges with applicable statutory minimum sentences, or to acknowledge discontinuities. Nothing in that exercise suggests that the Commission would be entitled to deference in its understanding of the mandatory minimum statutes. Petitioner asserts that courts should reconcile statutory sentencing provisions with the Commission's resolution of parallel issues under the Guidelines. Pet. Br. 24 (citing, *inter alia*, *United States* v. *McFadden*, 13 F.3d 463, 467-468 (1st Cir. 1994) (Breyer, C.J., dissenting)). But unless Congress directs otherwise, the meaning of a sentencing statute does not fluctuate based on the Commission's attempts to formulate the separate Guidelines sentencing regime.

LSD crystals among carrier media. Rather, the Commission based its dosage weight approach on policy judgments, different from those of Congress codified in Section 841(b), regarding the appropriate sentences in LSD cases. See Guidelines § 2D1.1, Commentary (Background).

Although petitioner disclaims strict reliance on the familiar principles of deference to agency interpretation expounded in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), he suggests that "the Commission is *a judicial* agency and its rulemaking may therefore be binding on courts on sentencing matters." Pet. Br. 14. Congress did establish the Commission as "an independent commission in the judicial branch." 28 U.S.C. 991(a). The Commission, however, plainly "is not a court and does not exercise judicial power." *Mistretta*, 488 U.S. at 384-385; see *id.* at 393. The Commission therefore has neither the judicial power to "say what the law is" with respect to Section 841(b) nor the congressionally delegated administrative power to interpret terms in that statute.

Certain interpretations by the Sentencing Commission are entitled to deference; in particular, Commission commentary interpreting the Guidelines is entitled to the same deference as that given to an agency's interpretation of its legislative rules. See *Stinson* v. *United States*, 113 S. Ct. at 1919; see also *Williams* v. *United States*, 503 U.S. 193, 200-201 (1992) (Commission's policy statement interpreting Guideline is authoritative guide to its meaning). In addition, courts have deferred to the Commission's reasonable interpretations of language in its own organic statute, the Sentencing Reform Act. See, *e.g.*, *United States* v. *Doe*, 934 F.2d 353, 359 (D.C.

Cir.), cert. denied, 502 U.S. 896 (1991); *United States* v. *Consuegra*, 22 F.3d 788, 789 (8th Cir. 1994). But the Commission's revised LSD Guideline is not an exercise of any power delegated by the Anti-Drug Abuse Act, and it lacks any force in the interpretation or construction of that Act.

3. Petitioner relies on lower-court decisions in which, he argues, the courts have construed provisions in sentencing statutes to conform them to the Sentencing Guidelines. See Pet. Br. 22, 24, 26-27. He suggests that those cases confirm the Commission's authority "to define and construe technical terms within the drug penalty statute." *Id.* at 23. That argument cannot be sustained.

In *United States* v. *Shabazz*, 933 F.2d 1029 (D.C. Cir.), cert. denied, 502 U.S. 964 (1991), the court, per then-Judge Thomas, upheld a Sentencing Guideline providing for sentences to be based on the weight of a "mixture or substance" containing hydromorphone against a contention that the Anti-Drug Abuse Act required sentences to be based on the pure drug.[19] The court of appeals concluded that "mixture or substance" sentencing was within the Commission's

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[19] Hydromorphone is a schedule II controlled substance, and trafficking in it is made criminal by 21 U.S.C. 841(a). Trafficking in hydromorphone, however, is not subject to the mandatory minimum penalties set forth in Section 841(b)(1)(A) or (B). Nor is hydromorphone covered by the penalties in Section 841(b)(1)(D), which relate to marijuana, hashish, and schedule III, IV and V substances. By default, therefore, the penalties for hydromorphone are found in Section 841(b)(1)(C). With certain exceptions, Section 841(b)(1)(C) provides only a maximum penalty of 20 years' imprisonment for drug offenses covered by that Section, and it does not contain the "mixture or substance" language found elsewhere in Section 841(b).

discretion because, in the statute, "Congress said absolutely nothing about how the sentence imposed should be tailored to the weight of the hydromorphone involved." 933 F.2d at 1035. That conclusion is consistent with our argument here. If Congress does not require any particular sentencing treatment, then the Commission may exercise its own delegated discretion. But if Congress speaks to a particular sentencing issue, then its direction must be given controlling effect over an inconsistent Guideline.

Petitioner also relies (Pet. Br. 25-26) on a series of cases in which the courts concluded that a traditional principle of conspiracy law, limiting a defendant's liability for actions of a co-conspirator to those acts that were reasonably foreseeable consequences of the conspiracy, should be applied to the federal drug conspiracy statute, 21 U.S.C. 846. See *Pinkerton* v. *United States*, 328 U.S. 640, 647-648 (1946). In those cases, the courts observed that the Sentencing Guidelines incorporated the *Pinkerton* rule in Guidelines § 1B1.3, and that applying *Pinkerton* in prosecutions under Section 846 had the virtue of harmonizing the sentencing principles of the Guidelines and the statutes. See, *e.g.*, *United States* v. *Irvin*, 2 F.3d 72, 77-78 (4th Cir. 1993), cert. denied, 114 S. Ct. 1086 (1994); *United States* v. *Young*, 997 F.2d 1204, 1210 (7th Cir. 1993); *United States* v. *Martinez*, 987 F.2d 920, 926 (2d Cir. 1993).

The desire for such consistency, however, was not an overriding basis for the decisions in those cases; nor did the courts reach their decisions because of deference to the Commission. See *Irvin*, 2 F.3d at 77 (Guidelines rule "not controlling of our decision"); *Young*, 997 F.2d at 1210 (framing question as whether Guidelines' approach "is also applicable to cases in

which the sentence is governed not by the Guidelines but by the statutory mandate"). In each case, the court independently examined the reach of Section 846 and concluded, based on Congress's assumptions and purpose in enacting that statute, that Congress had not intended to depart from the *Pinkerton* rule. See *Irvin*, 2 F.3d at 75-77; *Young*, 997 F.2d at 1210; *Martinez*, 987 F.2d at 925. Similarly, the sentencing determination in this case calls for application of a statute, as construed by the courts. The Commission's new LSD Guideline is not relevant to that task.

B. Because The New LSD Guideline Is Inconsistent With *Chapman*, It Does Not Govern Sentences Under The Mandatory Minimum Statute

Even if the Commission did have a role to play in construing Section 841(b), such that principles of deference would normally be relevant, the new LSD Guideline nonetheless could not be applied to the mandatory minimum statute. *Stare decisis* requires that the Commission's approach be evaluated for its conformity to governing precedents construing the language of Section 841(b), including *Chapman*. Because the revised LSD Guideline is inconsistent with *Chapman*, it does not govern cases like this one.

This Court has held that, "[o]nce we have determined a statute's clear meaning, we adhere to that determination under the doctrine of *stare decisis*, and we judge an agency's later interpretation of the statute against our prior determination of the statute's meaning." *Lechmere, Inc.* v. *NLRB*, 502 U.S. 527, 536-537 (1992); *Maislin Industries*, 497 U.S. at 131. Thus, even in the context of a statute that is administered by an agency usually entitled to defer-

ence to its construction of ambiguous terms—as was the case in both *Lechmere* and *Maislin*—this Court's definitive construction of a statutory provision controls any subsequent administrative interpretations of the statute. Agency interpretations that are inconsistent with the judicial construction cannot be given effect.

Chapman was indisputably a construction of the "clear meaning" of Section 841(b). In that case, the Court rejected the petitioners' argument that the statutory words "mixture or substance" are ambiguous. 500 U.S. at 458-459. The Court reasoned that, since "Congress clearly distinguished between the pure drug and a 'mixture or substance containing a detectable amount of' the pure drug[,] * * * under the language of the statute the weight of the mixture or substance * * * is controlling." *Id.* at 459-460. The Court therefore held that, "[s]o long as it contains a detectable amount, *the entire mixture or substance is to be weighed* when calculating the sentence." *Id.* at 459 (emphasis added). The Court also employed traditional tools of statutory construction, including reference to the ordinary meaning of the words, to arrive at the conclusion that LSD-infused blotter paper is a "mixture or substance." *Id.* at 462. The Court rejected the petitioners' reliance on the rule of lenity because, it concluded, the statute is not ambiguous, and the "straightforward reading" of the statute does not produce a result demonstrably at odds with Congress's likely intent. *Id.* at 463-464. And, although the Court was well aware that "those selling the same number of doses [c]ould be subject to widely varying sentences depending upon which carrier medium [is] used" (*id.* at 458 n.2), it held that

Congress had a rational basis for tying penalties to the weight of drugs in the form in which they are actually sold (*id.* at 465).

The new LSD Guideline is inconsistent with *Chapman*'s rule that "the entire mixture or substance" is to be weighed when calculating the sentence. The Guideline specifically directs courts *not* to use the entire weight of the entire mixture or substance: "In the case of LSD on a carrier medium (*e.g.*, a sheet of blotter paper) do not use the weight of the LSD/carrier medium." Guidelines § 2D1.1(c) n.*. The binding background commentary to the Guideline explains that the Commission deliberately chose not to tie the base offense levels to the "entire weight of the LSD and carrier medium" because doing so, in the Commission's view, "would produce unwarranted disparity among offenses" involving LSD. Guidelines § 2D1.1, Commentary (Background).

Petitioner suggests, however, that the revised LSD Guideline can be viewed as simply a standard definition of the amount of a carrier medium that constitutes a "mixture." Pet. Br. 47-49.[20] There is no hint in the Guideline or the commentary, however, that the Commission viewed its amendment in that fashion. Furthermore, even if the Commission had adopted that view, the result would be inconsistent with *Chapman*. An important basis for the decision in *Chapman* was the Court's recognition that Congress had adopted a "market-oriented" approach to punishing drug trafficking, under which "the total quantity of what is distributed" determines the

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[20] As petitioner observes, the Ninth Circuit and several dissenting judges have also taken that position. *Muschik*, 49 F.3d at 516; *Stoneking*, 60 F.3d at 407 (Beam, J., dissenting).

length of the sentence. 500 U.S. at 461. Congress "intended the penalties for drug trafficking to be graduated according to the weight of the drugs in whatever form they were found." *Ibid.* There is no room in that sentencing scheme—which applies to many other drugs as well as LSD—for the operation of the Commission's system based on the constructive weight of LSD.

Indeed, the amended Guideline could not be squared with the language of Section 841(b), even if the question in *Chapman* were still open. The statute requires that the sentence be based on "a mixture or substance" containing LSD. 21 U.S.C. 841(b)(1)(A)(v). Petitioner argues that "a" mixture or substance need not be the heaviest possible mixture of drug and carrier, and that the Commission has authority to specify "the" mixture or substance to be used in calculating the weight of the LSD. Pet. Br. 38. But in Section 841(b) Congress plainly referred to any particular mixture or substance containing LSD involved in the defendant's offense and made the weight of that mixture or substance the basis for invoking the mandatory penalties. Congress did not refer to a hypothetical, average mixture or substance. One might argue—as the petitioners did in *Chapman*—that the weight of only the pure drug should be taken into account; but one cannot reasonably argue that something more than the pure drug, but less than the entire mixture or substance, should be used.

Under petitioner's approach, the meaning of the statutory language could change frequently, depending on the Commission's interpretation. Petitioner evidently is content with the Commission's current directive, based on a constructive weight of 0.4 milligram per dose of LSD. In the future, however,

the Commission might conclude that LSD offenses were not being punished severely enough and might assign a constructive weight of (for example) 1 milligram, or even 8 milligrams, to each dose of LSD. See note 5, *supra* (8 milligrams is average weight of dose of LSD carried on blotter paper). The Commission might even revert to a system based on the actual weight of the entire mixture or substance. Even if, in unusual cases, it might be difficult to determine whether a particular material is a "mixture or substance," the statutory terms are not so pliable that they can mean an actual mixture or substance, and also any constructive mixture or substance weighing any amount less than an actual mixture or substance. No accepted theory of statutory interpretation supports such a peculiar result.

III. CONGRESS DID NOT OVERRIDE *CHAPMAN* WHEN IT PERMITTED THE REVISED LSD GUIDELINE TO TAKE EFFECT

Finally, petitioner contends (Pet. Br. 10-11, 28-31) that Congress itself overrode *Chapman* and approved the application of the new LSD Guideline to Section 841(b) when it failed to modify or disapprove the Guideline before it took effect six months after the Commission transmitted it to Congress.[21] That argument fails for several reasons.

First, as discussed above (pp. 20-21, *supra*), the commentary to the amended Guideline specifically disclaims any intent to "override" the definition of "mixture or substance" established in *Chapman*, and it acknowledges the controlling force of mandatory

[21] See also *Muschik*, 49 F.3d at 517; *Stoneking*, 60 F.3d at 409 (Beam, J., dissenting).

minimum sentencing statutes. As a result, Congress had no reason to believe that Amendment 488 would affect the calculation of mandatory minimum sentences under Section 841(b), and its failure to block that Amendment cannot be viewed as congressional approval of such a change.

Second, the premise of petitioner's argument, that Congress's failure to block a Guidelines amendment could alter the meaning of Section 841(b), is inconsistent with basic constitutional principles. This Court's construction of Section 841(b) is controlling unless and until Congress amends the law. Congress cannot change the law through inaction; under Article I, Section 7, of the Constitution, a statute can be amended only if a bill is passed by both Houses of Congress and signed by the President (or if Congress validly overrides a presidential veto). *INS* v. *Chadha*, 462 U.S. 919, 951-959 (1983). This Court has also instructed on numerous occasions that Congress's failure to enact legislation is an unreliable basis for conclusions about its intent. See, *e.g.*, *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 114 S. Ct. 1439, 1453 (1994); *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101, 114 (1989); *Schneidewind* v. *ANR Pipeline Co.*, 485 U.S. 293, 306 (1988).

Sibbach v. *Wilson & Co.*, 312 U.S. 1 (1941), is not to the contrary. In that case, the Court sustained the validity of Rule 35 of the Federal Rules of Civil Procedure against the contention that it contravened the statutory restriction that the Rules not affect substantive rights. The Court observed that, pursuant to the Rules Enabling Act, it had submitted Rule 35 to Congress for consideration, and that the Rule had not taken effect until the expiration of a six-

month period of congressional review. 312 U.S. at 14-15. The Court noted that report-and-wait provisions are "frequently * * * employed to make sure that the action under the delegation squares with the Congressional purpose," and it concluded that "[e]vidently the Congress felt the rule was within the ambit of the statute as no effort was made to eliminate it from the proposed body of rules." *Id.* at 15.

As a general matter, it is doubtful that any inference about Congress's intent may be drawn from its failure to overturn a rule submitted to it for review under a report-and-wait provision.[2] Even if an inference could be drawn in some cases, none that assists petitioner could be drawn here. Congress may well have satisfied itself that the revised LSD Guideline is consistent with the Commission's authority, and with Congress's own general policy principles, insofar as it concerns sentencing *under the Guidelines*. That, in turn, may have been sufficient for Congress to allow the Guideline to take effect. The revised LSD Guideline is not, however, an exercise of any power delegated by Congress to the Commission

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[2] As Justice Frankfurter, joined by Justices Black, Douglas, and Murphy, observed in *Sibbach*, 312 U.S. at 18 (dissenting opinion):

> [L]ittle significance attaches to the fact that the Rules, in accordance with the statute, remained on the tables of two Houses of Congress without evoking any objection * * * and thereby automatically came into force. Plainly the Rules are not acts of Congress and can not be treated as such. Having due regard to the mechanics of legislation and the practical conditions surrounding the business of Congress when the Rules were submitted, to draw any inference of tacit approval from non-action by Congress is to appeal to unreality.

to implement Section 841(b). Contrary to petitioner's suggestion (Pet. Br. 31), Congress's failure to block implementation of Amendment 488 does not imply its approval of the new Guideline to sentencing under Section 841(b).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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OCTOBER 1995